No. 78-854

In the Supreme Court of the United States

OCTOBER TERM, 1978

HARRY P. HUTUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner, in this collateral attack on his conviction, asserts (Pet. 7-18) that the Double Jeopardy Clause was violated by his conviction in federal court following acquittal on related state charges. He also disputes (Pet. 18-25) various evidentiary rulings of the trial court.

1. After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy,

in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of five years' imprisonment on each of the ten counts. The court of appeals affirmed, 416 F.2d 607 (1969), and this Court denied certiorari, 396 U.S. 1012 (1970). Petitioner has completed service of his sentence.

Petitioner subsequently filed the present application to vacate his sentence under 28 U.S.C. 2255, which was dismissed by the district court without a hearing. The court of appeals affirmed (Pet. App. 1a-6a).

The evidence at trial showed that petitioner, a former member of the Illinois bar, represented several individuals in making fraudulent insurance claims for personal injury and lost wages, and that he used the mails in furtherance of these schemes (Pet. App. 2a; see also 416 F.2d at 610-614, 615-616).

2. Petitioner contends (Pet. 7-18) that his conviction should be vacated because the Double Jeopardy Clause barred his federal mail fraud prosecution after his acquittal on related charges in a state prosecution. In *United States* v. *Wheeler*, 435 U.S. 313 (1978), this Court recently reviewed and reaffirmed the principle that a state prosecution does not bar a subsequent federal prosecution "of the same person for the same acts." 435 U.S. at 316-318. There accordingly is no reason to reexamine that doctrine at the present time.[1]

[1] Petitioner attempts (Pet. 8-9) to distinguish his case from *Abbate* v. *United States*, 359 U.S. 187 (1959), and *Wheeler*, *supra*, on the basis that those cases involved prior convictions rather than prior acquittals. This is, as the court of appeals noted (Pet. App. 5a), "a difference without legal significance," since the dual sovereignty concept turns on the distinctness of the prosecuting entities, not on the outcome of the particular prosecutions. See *United States* v. *Johnson*, 516 F.2d 209, 212 (8th Cir.), cert. denied, 423 U.S. 859 (1975).

3. Petitioner also asserts (Pet. 18-25) that the trial court made various erroneous evidentiary rulings.

a. He argues (Pet. 18-21) that the district court, in instructing at the close of the government's case that all the evidence was to be considered against all the alleged co-conspirators, in effect directed a guilty verdict.

Under Seventh Circuit precedent (see *United States* v. *Allegretti*, 340 F.2d 254, 256 (1964), cert. denied, 381 U.S. 911 (1965)), it is the province of the court to determine whether adequate evidence of the conspiracy has been introduced to permit admission of co-conspirators' out-of-court statements. Contrary to petitioner's assertion (Pet. 20), however, the trial court did not at any time tell the jury that it was admitting the testimony because it was satisfied that the conspiracy had been adequately established. Rather, the court simply instructed the jury "that all the evidence that has been introduced * * * will be considered against all the defendants" (Tr. 1879-1880), without explaining the legal basis for its ruling. Petitioner's claim that the court directed a verdict of guilty by expressing its views on the existence of the conspiracy is therefore without support in the record.

b. Petitioner also contends (Pet. 21-23) that the district court erred in not permitting petitioner to introduce certain written statements into evidence.

Claimed errors of law in evidentiary rulings are not cognizable in collateral proceedings unless the error involves "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill* v. *United States*, 368 U.S. 424, 428 (1962); see also *Davis* v. *United States*, 417 U.S. 333, 346 (1974). Petitioner here does not specify how the exclusion of evidence, which concerned a witness's ability to idenitfy one of petitioner's co-defendants, constituted such a "fundamental defect" in his case. Further, the court of appeals considered and rejected this allegation of error on direct appeal (see 416 F.2d at 623-624),[2] and accordingly further review of this claim is not warranted. See *Sanders* v. *United States*, 373 U.S. 1, 9 (1963).

c. Finally, petitioner contends (Pet. 23-25) that the introduction into evidence of certain government exhibits deprived him of his right to confront the witnesses against him. However, petitioner does not even allege that any of the challenged exhibits incriminated him;[3] he therefore has entirely failed to

[2] Contrary to petitioner's assertion (Pet. 22-23), the court of appeals specifically held on direct appeal that the trial court "did not err in refusing to admit" the proferred evidence . See 416 F.2d at 624.

[3] Indeed, Exhibit 91, of which petitioner principally complains, was apparently admitted only against co-defendant Sacks (see Tr. 1879-1880).

show any prejudice upon which collateral relief could be premised.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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